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283, 289; *WILLISTON, SALES*, §§ 284, 305. It makes no difference that here the shipper's purpose is to defraud third persons. For a discussion of the presumption of assent to the late shipment, see *NOTES*, p. 555.

STATUTE OF FRAUDS — PART PERFORMANCE — MUTUAL WILLS. — A husband and wife orally contracted that all their property should go to the survivor. Shortly thereafter each made a will leaving all property to the other. Four days before his death, the husband, without the knowledge or consent of the wife, made a new will leaving real property to the defendants. *Held*, that the contract is specifically enforceable. *Brown v. Webster*, 134 N. W. 185 (Neb.).

A contract to devise is specifically enforceable against heirs, devisees, or grantees. *Smith v. Yocum*, 110 Ill. 142; *Croft v. Layton*, 68 Conn. 91, 35 Atl. 783; *Parsell v. Stryker*, 41 N. Y. 480. However, an oral contract to devise realty will not be enforced in the absence of sufficient part performance to take the contract out of the Statute of Frauds. *Harder v. Harder*, 2 Sandf. Ch. (N. Y.) 17; *Weeks v. Lund*, 69 N. H. 78, 45 Atl. 249. The mere making of mutual wills has been held insufficient part performance. *Hale v. Hale*, 90 Va. 728, 19 S. E. 739. This has been so held on the ground that the survivor has not changed his position by such performance. *Gould v. Mansfield*, 103 Mass. 408; *Stone v. Hoskins*, [1905] P. 194. One case holds the contrary view, declaring that the survivor has undergone a risk for which money damages would be inadequate compensation. *Turnipseed v. Serrine*, 57 S. C. 559, 35 S. E. 757. This view, it is submitted, is the better, and on this ground the principal case seems correct if the will is clearly referable to the contract, which, it is submitted, is questionable. Further, it has been held, in accord with the principal case, that subsequently executed mutual wills, though not referring to the contract, are in themselves a sufficient memorandum under the statute. *Shroyer v. Smith*, 204 Pa. St. 310, 54 Atl. 24. However, the opposite view seems preferable. *Hale v. Hale*, *supra*.

TRUSTS — POWERS AND OBLIGATIONS OF TRUSTEES — RIGHT OF TRUSTEE WITH LIFE INTEREST IN RES TO PROFITS FROM UNAUTHORIZED INVESTMENTS. — A trustee who was also life tenant of the *res* expended part of the fund in unauthorized investments and received thereby a larger income than could have been gained from authorized securities. *Held*, that the remainderman cannot recover the excess of income from the trustee's estate. *In re Hoyles*, [1912] 1 Ch. 67.

It has been held that a trustee making unauthorized investments and paying increased profits to the tenant for life is discharged from liability if the original fund is paid undiminished to the remainderman. *Slade v. Chaine*, [1908] 1 Ch. 522. But *cf.* *Dimes v. Scott*, 4 Russ. 195; *In re Hill*, 50 L. J. Ch. 551. Such a question, however, is in its essentials a controversy as to the rights of the two *cestuis que trust*, and does not involve the question of any profit arising to the trustee. It is an elementary proposition that a trustee should not make a profit out of his office. See *LEWIN, TRUSTS*, 12 ed., 306. When his breach of trust works evident damage to the *cestui*, it is clear that he must make reparation. *Wightwick v. Lord*, 6 H. L. Cas. 217. In the principal case the trustee has taken an unauthorized risk in respect to the trust *res* and has paid the increased compensation gained thereby to himself as life tenant. By his dual relation to the *res* he has gained a profit at the risk of the remainderman. As a practical result the decision allows a trustee to make a profit out of his position.

WILLS — CONSTRUCTION — "ISSUE" HELD TO MEAN "DESCENDANTS." — A will contained a devise to A. for life, and after his decease, leaving a wife